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In The

Supreme Court of the United States

October Term, 1979

No. 79-819

SALVATORE LOMBARDI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

Supreme Court of the United States

OCTOBER TERM, 1979

No.

SALVATORE LOMBARDI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Salvatore Lombardi respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on August 21, 1979. A timely petition for rehearing *en banc* was denied on October 25, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is unreported and appears as Appendix A to this petition. The court of appeals, in a unanimous *per curiam* opinion, affirmed a judgment entered following a jury trial in the United States District Court, Eastern District of New York (Hon. Edward R.

Neaher, J.), which found petitioner guilty of conspiring to manufacture and possess with intent to distribute methaqualone, the controlled substance commonly known as "quaaludes", in violation of 21 U.S.C. §846. Petitioner was sentenced to the custody of the Attorney General for a term of five years' imprisonment, a special parole term of five years, and a fine of $10,000.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254. The petition for a writ of certiorari is filed within thirty days of the court of appeals' denial of the motion for reargument *en banc*.

QUESTIONS PRESENTED

1. Did the court of appeals erroneously uphold the trial judge's ruling admitting into evidence the conversations between the Government's informant Marchese and the defendant Gillette as evidence-in-chief against petitioner over the objection that such testimony was rank hearsay as to petitioner and the claim that petitioner's right of confrontation was violated?

2. In a concededly close case, did the multiple improprieties in the prosecutor's summation deprive petitioner of due process of law and a fair trial?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

Amendment V:

> "No person shall be held to answer for a capital or otherwise infamous crime . . . nor be deprived of life, liberty or property, without due process of law . . ."

STATUTES INVOLVED

Title 21, United States Code, Section 846 states:

> "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense the commission of which was the object of the attempt or conspiracy."

Title 21, United States Code, Section 841(a)(1) states:

> "(a) except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally . . .
>
> (1) to manufacture, distribute or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance . . . ."

STATEMENT OF FACTS

Petitioner Salvatore Lombardi was charged, along with co-defendants Joseph DiPalermo, George Gillette, William Romano and Alan Kassebaum, with a conspiracy to knowingly and intentionally manufacture, distribute and possess, with intent to distribute, quantities of methaqualone, a Schedule II controlled substance. The Government contended Lombardi participated in the conspiracy by providing financial support.

The Evidence

The Government's chief witness was Vincent Marchese, a paid informant for various government agencies (285)[1], including the Drug Enforcement Agency (DEA) which, as of the time of trial, had already paid him $9,600 (58) for information relating to this case.

At trial, Marchese testified, over objection[2] (62), that an old friend and one-time business partner (60), George Gillette, approached him in April 1977 for assistance in purchasing some non-controlled[3] chemicals for a friend named Herman (68), who needed these chemicals to manufacture quaaludes (77-78). He claimed Herman had previously manufactured quaaludes at a plant in Brooklyn (78).

Gillette indicated he would be given the opportunity to buy the product at a price of $1 a tablet, when the street value was approximately $5 - $7 a tablet (79). After contacting several drug companies without success, Marchese contacted the DEA (80), which found a supplier — Berg Chemical Company in Manhattan (81).

The purchase price of the chemicals, which Gillette claimed had to be approved by Herman, was approximately $10,000 (84). On May 11, Marchese, accompanied by Gillette, purchased approximately $5,000 of money orders under the name Robert Burke (85-86). Gillette claimed the money, which was used as a

1. Parenthetical references are to pages in the trial transcript.

2. Defense counsel objected on the basis that since the alleged conversation occurred outside the dates charged in the indictment, the testimony was hearsay as against any defendant other than the declarant (62). The prosecutor offered the statements on the basis that, "These are statements in furtherance of a conspiracy to show a formation of a conspiracy." (62-63).

3. N-acetyl anthreneche acid, O Tcluidine, Poly phosphoric acid.

down payment for the chemicals as well as the balance received later, was supplied by Herman (85, 92).

In addition, Gillette claimed Herman told him the brand of anthrenihe acid should not be "Sherman Williams", but rather should be "Chemisphere" because it worked better (90).

The chemicals were picked up by Gillette and Marchese on June 23 and transported by them from the Berg Chemical Company warehouse in the Bronx (635) to a warehouse in Elizabeth, New Jersey (95), where they were observed by DEA Agent Dennis Nargi (635-636). The drugs remained in the warehouse throughout the summer.

In conversations between Gillette and Marchese on June 30, Gillette explained that the delay was caused by Herman's difficulty in finding a suitable laboratory (96-98).

In late August, the chemicals were moved to a storage trailer in front of the warehouse (112).

On September 15, Gillette informed Marchese that if Herman did not find a laboratory soon, Gillette would secure one (115). Gillette further stated that he wanted to see Herman to get an idea where to place the chemicals (114). Gillette allegedly called Herman at his home and said he would be over in a little while (114). Later that day, Gillette's car was observed by DEA Agent Nargi in front of 182 Gower Street, Staten Island[4] (643).

With the manufacturing plans at a standstill, Marchese informed Gillette on October 4 that he was interested in purchasing a pound of "speed"[5] from Gillette for $5,300[6].

4. At the time of his arrest, Lombardi indicated he lived at 182 Gower Street and maintained a residence in Florida (893).

5. Methedrine hydrochloride.

6. The funds were supplied by the DEA.

Instead, Gillette sold Marchese ephirene, a non-controlled and virtually valueless substance (117).

A. The Delivery

The chemicals were finally moved on October 31, 1977, after a laboratory was allegedly obtained through the efforts of defendant DiPalermo.

A portion of a street corner conversation between Gillette and DiPalmero was allegedly overheard on October 26, during which Gillette was told, "This is what you do."

Gillette rented a Ryder Rental Truck (198) and drove with Marchese to Elizabeth, where they loaded the truck (201). They then proceeded to Staten Island and parked the truck on Gower Street. When Marchese asked why the truck was parked there, Gillette explained that the location was near Herman's house[7] so Herman could watch the truck (212).

DEA Agent Philip Hayward observed the truck park and Gillette walk away (951). DEA Agent Kelley arrived at Gower Street at approximately 11:30 a.m. and observed the Ryder truck parked (735). Kelley positioned himself about a block away, making periodic "swings" past the truck (736). At approximately 1:00 p.m., he observed a black Mercury parked near the truck (736). A short time later, the black Mercury

7. Marchese was permitted to testify, over objection, that in March 1977 Gillette referred to the Gower Street home as being Herman's (213). Herman is the alleged pseudonym for Salvatore Lombardi.

Later that evening, Gillette allegedly called Marchese and asked him to come over the following morning to drive Gillette to the parked truck. Gillette said Herman had delivered the material to the plant and everything was all right (222).

However, Case Agent Nargi testified that notwithstanding the extensive surveillance of said premises (709), Lombardi was never seen leaving these premises (703, 710).

stopped at a stop sign adjacent to Kelley's observation point (736). Kelley identified the driver as defendant Romano (739). At 2:00 p.m., DEA Agent Hayward observed the Ryder truck leave, followed by the black car (951).

Agent Kelley began driving toward the truck's location when he observed the Ryder truck pass down the street in the opposite direction (815). This allowed him a second or two to glance at the driver (810). Due to lack of recognition (817-818), Kelley identified the driver in his official report as John Doe #5 (817). Approximately six weeks later, on December 8, 1977 (819), Kelley identified John Doe #5[8] as Salvatore Lombardi (714, 818).

At 6:20 p.m., DEA Agent Nargi saw the truck leave the area of Gower Street (645). An hour later, the truck was again spotted, but Agent Nargi could not identify any of the truck's occupants (646).

Gillette called Marchese that day to say Herman had moved the truck to Brooklyn, but brought it back because he thought he was being followed (221). He called again to say Herman had delivered the "material" to the plant (222).

On November 14, 1977, in the vicinity of 140 Johnson Street, Staten Island, Agents Doland and Maguire stopped a van driven by defendant Kassebaum and placed him under arrest (867).

Armed with a search warrant for the premises at 132 Ellis Street, the agents drove to said location, entered the premises and discovered a laboratory on the second floor of the building (868).

8. In a report (exhibit 3500-19) Agent Kelley referred to the driver of the truck as John Doe #5 as late as December 19, 1977 (822, 849).

The house on Gower Street was under periodic surveillance from May 1977 to November 1977. No agent ever claimed to see Lombardi enter or leave the house during this period (709-710). No witness testified that he observed Lombardi at 132 Ellis Street, the alleged location of the laboratory.

The only testimony that Lombardi had any contact with the other defendants was a post-conspiracy obervation of Lombardi and Romano leaving Brooklyn's DelRio Diner together on February 28, 1978 (752), months after the end of the alleged conspiracy[9], and an assertion that Lombardi and Romano were simultaneously presented at a Brooklyn social club (888).

B. The Arrest

On March 11, 1978, Agent Maguire took Salvatore Lombardi into custody pursuant to an indictment warrant issued in the Eastern District of New York. The arrest was made outside 182 Gower Street (889). While taking pedigree information from Lombardi, Agent Maguire ascertained that Lombardi lived at 182 Gower Street and also maintained an additional residence in Florida (893).

Motion to Dismiss

After the prosecution rested (1115), defense counsel moved, pursuant to Rule 29, for a dismissal of the charges. Judge Neaher denied the motion, except to the extent of dismissing against defendant Romano.

The Government's Summation

During his closing argument, Assistant United States Attorney Appleby, beyond a proper marshalling of the evidence

9. The indictment indicates the conspiracy lasted from May 5, 1977 to December 8, 1977.

and arguing inferences he believed should be drawn from the evidence, committed serious error.

In an obvious effort to influence the jurors and appeal to their emotions, Prosecutor Appleby made frequent references, over objection, to "narcotics" (1220). Despite the court's admonition (1221) to him and to the jury that the case involved a controlled substance, not narcotics, Appleby persisted by asking in open court:

> "As an abbreviation from now on, may I refer to it as narcotics with the understanding that I am referring to Quaaludes?" (1221).

Still later, Appleby identified the DEA agents' job as "narcotics, controlled substances investigations" (1247), further confusing these two substances in the jury's mind.

In the same vein, he reminded the jury that there are many "illegal traffickers in controlled substances" (1248) in the city and, without support, argued that the arrest in this case prevented ten million dollars worth of controlled substances from "hitting the streets of our city" (1223).

The prosecution repeatedly vouched for the credibility and truthfulness of its witnesses (1219, 1226, 1248) with statements that their testimony was "corroborated 100%"[10] (1227-1228) or "proved 100%" (1241) and stated their credibility could not be questioned (1226).

Appleby went one step further by indicating his own, as well as the agents' firm belief in Lombardi's guilt by stating that Agent Kelley:

10. This error was repeated in Appleby's rebuttal summation (1517), and Judge Neaher once again admonished him not to argue in this vein.

> "does not have to get up on the stand and implicate somebody who is innocent, as opposed to somebody who is truly involved in a conspiracy." (1248).

Despite warnings, Appleby read from transcripts not in evidence (1238, 1259) and interjected comments not supported by the record (1221, 1223, 1232).

At the same time, Appleby deprecated defense counsel by pointing out that the entire defense effort "proved nothing" for "they [didn't have] anything to work with in this case . . ." (1253), thus leaving the jury with the erroneous impression that the defense had the burden of proof in this case.

In addition, he attacked Mr. Newman's cross-examination of Agent Kelley as "just a gimmick" (1251) and claimed that if Lombardi had been identified at an earlier point in time, Mr. Newman would have claimed the DEA report had been "forged" (1251).

Appleby's most grievous error was in assuring the jury that even Mr. Newman, Lombardi's defense counsel, had to agree with the prosecutor that Herman was "certainly guilty" (1258).

Once again the trial judge admonished the prosecutor upon the inflammatory nature of his summation (1258).

Beyond his improper vouching for the credibility of the DEA agents during his rebuttal summation, Mr. Appleby referred to the requirement under the Jencks Act of turning over the agents' reports to defense counsel (1520). Defense counsel moved unsuccessfully for a mistrial (1522).

Furthermore, after Mr. Newman properly argued the unlikeliness of Lombardi's having illegally parked a truck containing the precursors facing in the wrong direction, the

government prosecutor improperly denigrated the argument not with facts, but with name-calling by referring to it as "another trick, another gimmick, an attempt to divert your [the jury's] attention from the real issues in the case." (1527-1528).

The Verdict

On August 18, 1978, the jury returned a verdict of guilty against Lombardi and the remaining co-defendants.

The Sentence

On November 3, 1978, Judge Neaher sentenced appellant to a term of five years' imprisonment, probation and a fine. The appellant is presently at liberty under the terms and conditions of bail pending appeal.

REASONS FOR GRANTING THE WRIT

I.

THE GOVERNMENT'S INTRODUCTION OF CONVERSATIONS BETWEEN MARCHESE AND THE NON-TESTIFYING CO-DEFENDANT GILLETTE WAS ERROR AND DENIED PETITIONER LOMBARDI A FAIR TRIAL.

A. The Evidentiary Hearsay Standard

The trial judge erred in allowing petitioner Lombardi's case to go to the jury for consideration along with alleged co-conspirators' out-of-court statements since the Government failed to establish by sufficient independent, non-hearsay evidence that petitioner Lombardi had participated in the conspiracy.[11]

It is a firmly established principle that before statements concerning one alleged conspirator made by another alleged conspirator may be considered as evidence against the non-declarant, the prosecution must prove by independent evidence that the defendant had both the knowledge of the intended goals of the conspiracy and was an active participant in the conspiracy. *Glasser v. United States,* 315 U.S. 60, 74, 62 S. Ct. 457, 467 (1942); *United States v. Geaney,* 417 F. 2d 1116 (2d Cir.), *cert. denied sub nom. Lynch v. United States,* 397 U.S. 1028, 90 S. Ct. 1276 (1969).

Since an entire case cannot be put in simultaneously, concededly the hearsay may be admitted at trial "subject to

11. We also contend that by introducing what the non-testifying Gillette said on August 24th to Marchese, through Marchese's testimony, counsel for Lombardi was deprived of his right to cross-examine the declarant, thereby depriving Lombardi of his Sixth Amendment rights of confrontation and the effective assistance of counsel. This aspect of the petition is covered in Part B herein.

connection". However, at the close of the Government's case, the court must determine whether the prosecutor had independently provided the requisite connection by proving the defendant's participation in the conspiracy. *United States v. Ziegler,* 583 F. 2d 77, 80 (2d Cir. 1978).

In *United States v. Nixon,* 418 U.S. 683, 701, 94 S. Ct. 3090, 3104 n. 4 (1974), this Court held that a condition precedent to such admissibility is a demonstration, by clear and convincing evidence, establishing the existence of a conspiracy at least sufficient to take the conspiracy count to a jury.

Notwithstanding this clear and unequivocal enunciation of the evidentiary standard, the Second Circuit boldly refuses to follow it under the principles of *stare decisis.* As Judge Friendly, writing for the court in *United States v. Mangan,* 575 F. 2d 32, 42 (2d Cir. 1978), made clear, the Second Circuit is aware of this standard, but continues to apply a mere "fair preponderance" standard originally set forth in *United States v. Geaney,* 417 F. 2d. Other circuits are mindful of the *Nixon* standard and purport to apply it. *See, e.g., United States v. James,* 590 F. 2d 575, 580-581 (5th Cir. 1979), *cert. denied,* 99 S. Ct. 2836.

We respectfully submit that the case at bar affords this Court the opportunity to clarify or modify this branch of the *Nixon* decision by indicating whether the Second Circuit's refusal to follow the *Nixon* holding is unwarranted. This is particularly the case since, even under the lenient *Geaney* standard, the court of appeals believed the case against petitioner Lombardi to be a "close case." *See United States v. DiPalermo, et al.,* slip op. 4295 at 4304.

The standard for assessing whether the independent evidence is legally sufficient to permit the affirmative use of what would otherwise be hearsay has been held, in the Second Circuit, to be:

"a fair preponderance of the evidence independent of the hearsay utterances." *United States v. Geaney, supra,* at 1120.

While the defendant's knowing participation in a conspiracy may, of course, be established by circumstantial evidence, *United States v. Manfredi,* 488 F. 2d 588 (2d Cir. 1973), *cert. denied,* 417 U.S. 936, 94 S. Ct. 2651, there still must be a competent and compelling evidentiary basis for inferring that the defendant knew about the enterprise and actively participated in it. *United States v. DiStefano,* 555 F. 2d 1094, 1103 (2d Cir. 1977); *United States v. Cirillo,* 499 F. 2d 872, 883 (2d Cir. 1974), *cert. denied,* 419 U. S. 1056 (1974); *United States v. Stanchich,* 550 F. 2d 1294, 1298 (2d Cir. 1977).

The only non-hearsay evidence introduced by the Government at trial, which arguably could be considered in determining Lombardi's knowing participation in a conspiracy to manufacture quaaludes, can be quickly noted: (1) DEA agents observed a Ryder truck and a car rented by defendant Romano[12] parked near 182 Gower St.; (2) defendant Gillette visited 182 Gower St; (3) a person, later identified as Lombardi, was briefly observed driving the Ryder truck; and (4) defendants Romano and Lombardi were observed at a diner several months after the conclusion of the conspiracy.

Concededly the proffered independent evidence must be viewed together and not in isolation. *United States v. Stanchich, supra,* at 1300; *United States v. Geaney, supra,* at 1121.

Even when the trial evidence is construed in the light most favorable to the Government, it is patently clear that the

12. The case against Romano was dismissed by the court following the conclusion of the Government's case. Accordingly, the use of Romano's activities as a basis for inferring criminal conduct on the part of Lombardi is unavailing.

prosecutor failed to establish by a "fair preponderance" that Lombardi had knowledge of the intent to manufacture quaaludes and participated in the enterprise.

In view of the fact that Judge Neaher dismissed the case against Romano, observations of Romano and Lombardi are not at all incriminating. The observation of defendant Gillette's activity near 182 Gower Street, in a residential section of Staten Island, is likewise not incriminating.

While there was no evidence presented at trial that Lombardi was living at 182 Gower Street during the period, in fact the only evidence before the court was to the contrary[13], proof of association with alleged conspirators or even knowledge of the conspirators' activities, without more, cannot be the basis for admission of hearsay statements. *United States v. Steinberg,* 525 F. 2d 1126, 1134 (2d Cir. 1974); *United States v. Tramunti,* 500 F. 2d 1334, 1348 (2d Cir. 1974).

What is required is proof of a knowing participation in the unlawful venture, *United States v. Cirillo, supra,* at 884-885, which is totally lacking in the instant case.

The Government places heavy reliance on the agent's fleeting glimpse of a man, presumed to be Lombardi, behind the wheel of the Ryder truck to infer knowing participation.

That this reliance is misplaced becomes apparent when it is remembered that all the chemicals the Government alleges to have been in the truck were non-controlled substances which may be freely purchased and transported by anyone.

13. Marchese testified that Gillette informed him that Herman, assuming the Government is correct that Herman is indeed Lombardi, was in Florida (216). Even though 182 Gower Street was under heavy surveillance during this period and several defendants were observed there, no agent ever claimed to see Lombardi enter or leave.

There was no evidence Lombardi knew what the contents of the truck were or, even if he did, that he intended to transport the non-controlled precursors in an effort to affirmatively assist in their manufacture into an illicit controlled substance. All that can be proven by the agent's identification is that Lombardi was, at one time, in close proximity to the raw chemicals.

Mere presence in the vicinity of the chemicals falls far short of making Lombardi a participant in an illegal conspiracy. *Hicks v. United States,* 150 U.S. 422 (1893); *United States v. Burgos,* 579 F. 2d 747 (2d Cir. 1978); *King v. United States,* 402 F. 2d 289, 291 (10th Cir. 1968).

In the instant case, the Government produced insufficient non-hearsay evidence to prove Lombardi had knowledge of the conspiracy and knowingly participated in it with the intent to further its goals.

Since almost all of the evidence offered against Lombardi was devastating hearsay declarations of a conspirator as related at trial by a paid informant, it cannot be said that any error in admitting the testimony was harmless. *Chapman v. California,* 386 U.S. 18; *United States v. Ruffin,* 575 F. 2d 346, 358-359 (2d Cir. 1978); *United States v. Check,* 582 F. 2d 668, 684 (2d Cir. 1978).

We also contend Marchese's recounting at trial, what the non-testifying co-defendant Gillette allegedly said to him, about "Herman", should have been excluded on the basis that these statements were not uttered during the pendency and in furtherance of the conspiracy charged.

The law of conspiracy is clear that not every statement uttered by an alleged co-conspirator during the life of the conspiracy is *ipso facto* a statement in the course and furtherance of the conspiracy.

> "The fact that one conspirator tells another something relevant to the conspiracy does not alone make the declaration competent; the declaration must itself be an act in furtherance of the common object; mere conversation between conspirators is not that. . . ." *United States v. Nardone,* 106 F. 2d 41, 43 (2d Cir.), *rev'd on other gds.,* 308 U.S. 338 (1938).

See also, Krulewitch v. United States, 336 U.S. 440, 443-444 (1949); *Dutton v. Evans,* 400 U.S. 74, 81, 91 S. Ct. 210, 215 (1970); *United States v. Birnbaum,* 337 F. 2d 490, 494-495 (2d Cir. 1964); *cf. United States v. Manarite,* 448 F. 2d 583, 590-591 (2d Cir. 1971); *United States v. Grant,* 462 F. 2d 28, 33 (2d Cir. 1972); *United States v. Mangan,* 575 F. 2d at 43-44.

Turning to the challenged statements, the first is Marchese's claim Gillette told him "Herman" (Lombardi) asked Gillette if he could supply some chemicals (68).

The question of who asked Gillette to acquire chemicals was irrelevant and immaterial to whether Marchese wished to assist in such a venture. Clearly, this paid informant witness utilized the fact of his conversation with Gillette to insert Lombardi into the case. Such a statement could not further the conspiracy claimed to exist.

At p. 77 of the trial transcript, Marchese was permitted to testify, over objection, that:

> "He [Gillette] said his friend Herman had manufactured qualudes (sic) once before. . . ."

Marchese's response to the question:

> "Did he [Gillette] tell you [Marchese] what he wanted to with those chemicals?" (77).

was unresponsive to the question propounded. Marchese stated Gillette's answer did not reflect a conversation to further the conspiracy. This statement permitted a clever, paid witness an opportunity to offer evidence against one defendant and to improperly introduce "other crimes" evidence.

> "Gillette told me he had spoken to his friend Herman and that Herman was not living in New York all the time. He lived in Florida, but he did have a house in Staten Island where his daughter lived and when he was in New York he spent time at the house in Staten Island."

Once again general hearsay conversation, not in furtherance of the conspiracy, was permitted into evidence in deprivation of Lombardi's right to a fair trial.

We think it is clear from these examples that the co-conspirator exception to the hearsay rule was stretched beyond its true limits [*see Weinstein's Evidence*, Sec. 801(d)(2)(E)(01)] by permitting a dispensation of the "in furtherance" component of the hearsay rule exception.

Such a departure permitted the introduction of devastating evidence against Lombardi, depriving him of a fair trial.

B. Denial of the Right of Confrontation

Even assuming *arguendo* this Court is persuaded the Government properly carried its burden of establishing the existence of a conspiracy and petitioner's knowing participation in it sufficient to overcome evidentiary hearsay objections to the use of Marchese's testimony, we submit the admission of that evidence violated petitioner's Sixth Amendment right of confrontation.

Since at least this Court's decision in *Dutton v. Evans*, 400 U.S. 74, 80, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970), the law has

been clear that the Sixth Amendment's confrontation clause and the co-conspirator exception to the hearsay rule are not co-extensive. *United States v. Puco*, 476 F. 2d 1099, 1103 (2d Cir.), *cert. denied*, 414 U.S. 844 (1973); *United States v. Oates*, 560 F. 2d 45, 80-84 (2d Cir. 1977); *United States v. Mangan*, 575 F. 2d 32, 42, 44-45 (2d Cir. 1978); *United States v. Nelson*, 603 F. 2d 42, 46 (8th Cir. 1979); *United States v. Lipscomb*, 435 F. 2d 795, 802 (5th Cir. 1970), *cert. denied*, 401 U.S. 980 (1971).

Thus where, as here, the defendant was confronted with and could cross-examine only the informant Marchese concerning what the declarant alleged said to Marchese vis-a-vis petitioner, it is clear that the opportunity to confront and cross-examine the declarant was denied.

We are not suggesting that in every instance where the co-conspirator exception is invoked and relied upon as a basis for the introduction of otherwise hearsay testimony that there has been a violation of the constitutionally grounded right of confrontation. Rather, we contend that under the facts of this case, as in many other cases, there has been a violation in a joint trial[14] setting.

The need to explore the intersection between the co-conspirator exception to the hearsay rule and the right of confrontation surely raises a valid question for this Court's consideration. There is certainly a need, at the *nisi prius* level, for just this type of guidance from the Court.

In the context of this case, the admission of Marchese's testimony was not harmless error. *Cf. Schneble v. Florida*, 405 U.S. 427. For this reason, a writ of certiorari to review the issue should be granted.

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14. Petitioner's motion for a severance was denied by the trial court.

II.

IN A CONCEDEDLY CLOSE CASE, MULTIPLE IMPROPRIETIES IN THE PROSECUTOR'S SUMMATION DEPRIVED PETITIONER OF A FAIR TRIAL.

Whether, as contended by petitioner, the trial evidence was legally insufficient to establish guilt or, as the Second Circuit recognized, the case was at best a "close" one barely sufficient to withstand a Rule 29 motion (*see United States v. DiPalermo, et al., supra,* at 4304), in such an evidentiary context the impact of the prosecutor's multiple improprieties at the trial and before the jury surely were sufficient to improperly tip the scales in favor of conviction.

Certainly it is true that wide latitude is given to the prosecution in rendering its summation. *United States v. Suarez,* 588 F. 2d 352, 354 (2d Cir. 1978); *United States v. Dibrizzi,* 393 F. 2d 642, 646 (2d Cir. 1968).

However, there are limits of proper advocacy beyond which counsel may not stray. When counsel represents the Government, he is held to a still higher standard:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Berger v. United States,* 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314, 1321 (1935).

It is clear from a reading of Prosecutor Appleby's summation that it was his intention to travel the "law road" in an effort to compensate for the evidentiary deficiencies surrounding the case against petitioner and to supplement an otherwise weak case.

Thus, in *United States v. Grunberger,* 431 F. 2d 1062 (2d Cir. 1970), the prosecutor's unobjected-to statement at 1068:

> "I don't know of a case where the evidence has been as strong as it has been in this case to establish the guilt of any defendant."

was found to be error because of the impropriety of an advocate expressing his personal opinion of an accused's guilt, and because of the prosecutor's vouching for and placing the prestige of the prosecutor's office behind an opinion contested by the rigors of cross-examination. *Cf. United States v. Morris,* 568 F. 2d 396 (5th Cir. 1978).

In *United States v. Drummond*, 481 F. 2d 62 (2d Cir. 1973), the prosecutor's bolstering of the credibility of his own witnesses and vouching for the credibility of his witnesses was found improper, requiring a new trial.

In *United States v. White*, 486 F. 2d 204 (2d Cir. 1973), in an opinion by Chief Judge Kaufman, a panel of the court of appeals found the prosecutor's argument that the defendant lied to the jury and his repeated indications that the defense was fabricated were clearly error and a departure from professional propriety. ABA Code of Professional Responsibility, Final Draft, 1969 E.C. 7-13; *see also*, ABA Standards Relating to the Administration of Criminal Justice, Section 5.8[15] (1974). However, it was not held to be reversible error because of the overwhelming evidence produced at trial. The case at bar has already been held *not* an overwhelming case by the court of appeals.

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15. Section 5.8 states:

> "(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
>
> (b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
>
> (c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
>
> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict."

Similarly, in *United States v. Burse*, 531 F. 2d 1151 (2d Cir. 1976), a series of prosecutorial summation abuses, including improper vouching, required a reversal and remand for a new trial. The Second Circuit in *Burse* noted at 1155 that the minimal strength of the Government's case against Burse required the remand for a new trial.

Likewise, in *United States v. Suarez*, 588 F. 2d 352 (2d Cir. 1978), while prosecutorial error in summation did not require a new trial, this was so only because of the panel's finding that the error was harmless.

More vigorous Government summation arguments have been found acceptable, or at least not reversible, where the response was instigated by the defendant's summation. *See, e.g., United States v. Brawer*, 482 F. 2d 117 (2d Cir. 1973); *United States v. Bivona*, 487 F. 2d 443 (2d Cir. 1973).

Turning to the summation in question, the overwhelming number of errors occurred during Mr. Appleby's initial summation and not during the rebuttal summation, when the "fair comment" theory of *Brawer, Bivona,* and its progeny would have some applicability.

In the case at bar, Appleby's frequent references to "narcotics" and the DEA agents as "narcotics" agents were unprovoked. They constituted a cold and calculated attempt to whip the jury's natural abhorence for narcotic drugs and the purveyors thereof into an improper and emotional anti-defendant hostility.

Similarly, the claim that this arrest prevented ten million dollars worth of controlled substances from "hitting the streets of our city" was not only an argument predicated upon facts outside the record, but one which again appealed to the hearts, rather than the heads, of this lay jury. *People v. Ashwall*, 39 N.Y. 2d 105, 383 N.Y.S. 2d 204 (1976); *Williams v. Henderson,*

451 F. Supp. 328, 332 (E.D.N.Y. 1978), *aff'd*, 584 F. 2d 974 (2d Cir. 1978).

Aware of the shaky, non-hearsay evidence proffered against petitioner Lombardi, Mr. Appleby, we submit, improperly vouched for his witnesses by arguing their testimony was corroborated 100% or proved 100%. He further improperly argued that the credibility of the prosecution's witnesses could not be questioned; that they would not frame innocent people. *Cf. United States v. Bess*, 593 F. 2d 749, 753-755 (6th Cir. 1979).

Not content to build his own case up by assuming the role of unsworn witness, Appleby then improperly attacked defense counsel on a personal basis, claiming they had nothing to work with in this case and that the cross-examination of a DEA agent by petitioner's counsel, Mr. Newman, was "just a gimmick." *Cf. United States v. Leon*, 534 F.2d 667, 668 (6th Cir. 1976) (an opinion by then Circuit Judge, now Solicitor General McCree).

Unsatisfied with personal name-calling and pointed deprecation of his adversary, Appleby then hypothesized that if petitioner had been identified by name rather than as "John Doe #5", Lombardi's counsel would have argued the report was forged.

To imply, as Appleby did, that Mr. Newman would accuse the Government of criminal wrongdoing could only be interpreted as an observation by the Government of the ethics and morality of its adversaries, thereby reducing the effectiveness of summations not yet even delivered. *Cf. United States v. Agueci*, 310 F. 2d 817, 836-837 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963).

Further, this implication was an infringement upon petitioner's Sixth Amendment guarantee of effective assistance of counsel. *Cf. Donnelly v. DeChristofaro*, 416 U.S. 637, 94 S. Ct. 1868 (1974).

Mr. Appleby likewise improperly argued that:

> "Whoever Herman is — if there is one thing that Mr. Newman and I could agree upon, is that whoever Herman is, he's certainly guilty."

We respectfully submit that by arguing that a lawyer knows his client is guilty, either directly or indirectly, is unfair and constitutionally improper. *United States v. Frazier*, 580 F.2d 229 (6th Cir. 1978); *People v. Tassiello*, 300 N.Y. 425 (1950).

In a particularly weak case such as this one, an argument of this nature, whether in isolation or in tandem with the other summation errors, requires a vacatur of the judgment of conviction and remand for a new trial.

In the rebuttal summation Mr. Appleby told the jury how the DEA reports were turned over to the defense for cross-examination (1022), thereby creating the impression that reports not used at trial were corroborative of the agents' testimony. This entire foray into the use of Jencks Act material was improper and clearly engaged in to bolster what was, at best, a weak case against Lombardi.

Finally, after Mr. Newman properly argued the unlikelihood of Lombardi, a Gower Street resident, allowing a truck containing precursors to remain illegally parked at a time when the alleged conspirators feared the presence of "heat" and apprehension, the prosecutor responded not with fact or logical argument, but with the claim this was but another trick or gimmick on Mr. Newman's part.

Thus we think it clear that in the initial summation and on rebuttal the prosecutor in this case attempted to improperly fill evidentiary gaps or weaknesses with invective rather than solid, credible proof.

The need for a new trial, rather than an admonition of this prosecutor's multiple ravings, is warranted for the reasons articulated by Judge Frank in *United States v. Antonelli Fireworks Co.*, 155 F. 2d 631 (2d Cir., Frank J., dissenting), *cert. denied*, 329 U.S. 742 (1945), and reaffirmed by Chief Judge Kaufman in *United States v. Bivona*, 487 F. 2d 443 at 447:

> "'The deprecatory words we use in our opinions . . . are purely ceremonial.' Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court — recalling the bitter tear shed by the Walrus as he ate the oysters — breeds a deplorably cynical attitude towards the judiciary."

The time has come, in the context of reviewing the fairness of a trial in a federal district court, for this Court to reaffirm its holding in *Berger v. United States, supra*, and the principle that prosecutorial overreaching during this critical phase of the criminal trial will not be tolerated. Where, as here, the reviewing intermediate appellate court finds the proof of guilt as to this petitioner not only not overwhelming, but rather a "close case", a vacatur of the judgment and remand for a new trial is constitutionally warranted.

CONCLUSION

For the reasons stated, we respectfully pray that a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit be granted.

Respectfully submitted,

Roger Bennet Adler
NEWMAN & ADLER, P.C.
Attorneys for Petitioner

APPENDIX A — OPINION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 962, 963, 964, 987—August Term, 1978.

(Argued May 2, 1979 Decided August 21, 1979)

Docket Nos. 78-1408, 78-1413, 79-1032, 79-1046

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH DIPALERMO, a/k/a "Joe Beck", SALVATORE LOMBARDI, a/k/a "Herman", GEORGE GILLETTE and ALAN KASSEBAUM,

Appellants.

Before:

GURFEIN and MESKILL, *Circuit Judges,*
and WYZANSKI*, *District Judge.*

Appeals from judgments of conviction entered in the United States District Court for the Eastern Dis-

* Hon. Charles E. Wyzanski, Jr., of the United States District Court for the District of Massachusetts, sitting by designation.

trict of New York, Edward R. Neaher, *Judge,* after a three-week jury trial. Affirmed.

MICHAEL ROSEN, New York, New York (Roy M. Cohn, Saxe, Bacon & Bolan, P.C., of counsel), *for Appellant DiPalermo.*

ROGER BENNET ADLER, New York, New York (Gustave H. Newman, New York, New York, of counsel), *for Appellant Lombardi.*

RAYMOND B. GRUNEWALD, New York, New York, *for Appellant Gillette.*

HARVEY L. GREENBERG, Brooklyn, New York (Frank T. Geoly, Brooklyn, New York, of counsel), *for Appellant Kassebaum.*

RICHARD APPLEBY, Assistant United States Attorney, Eastern District of New York (Edward R. Korman, United States Attorney, Harvey M. Stone, Assistant United States Attorney, Vivian Shevitz, Assistant United States Attorney, Eastern District of New York, of counsel), *for the United States of America.*

PER CURIAM:

Joseph DiPalermo, Salvatore Lombardi, George Gillette and Alan Kassebaum appeal from judgments of conviction entered in the United States District

Court for the Eastern District of New York, Edward R. Neaher, *Judge,* after a three-week jury trial. All of the appellants were convicted of conspiring to manufacture and possess with intent to distribute methaqualone, commonly known as "quaaludes," in violation of 21 U.S.C. § 846. Kassebaum was also convicted of possession of methaqualone with intent to distribute, 21 U.S.C. § 841(a)(1). Finding no reversible error, we affirm the judgments of conviction.

Viewing the evidence in the light most favorable to the government, *Glasser v. United States,* 315 U.S. 60, 80 (1942), the government showed that the following series of events took place. Beginning in April of 1977, one Vincent Marchese, a paid informant for the Drug Enforcement Administration, insinuated himself into a conspiracy to manufacture quaaludes. On April 15, Marchese met with appellant Gillette at Marchese's home in Staten Island. Gillette told Marchese that he had a friend named "Herman" who had manufactured quaaludes in the past but who needed a new supply of chemicals in order to stay in the business. "Herman" was apparently able to come up with the money, but had thus far been unable to come up with a connection leading to the necessary supplies—approximately 490 pounds of various chemicals. Marchese agreed to locate the needed source and immediately called the DEA, which in turn contacted the Berg Chemical Company. Marchese then informed Gillette that he had been successful in his search, and that the price of the chemicals would be $10,000—a price to which "Herman" agreed. Marchese and Gillette picked up the chemicals on June 23, 1977, and took them to a previously secured warehouse in New Jersey. The chemicals having been purchased, the next step was to

create a manufacturing laboratory—a task to which "Herman" was assigned.

Much to Marchese's and Gillette's consternation, however, "Herman," who by this time had been identified by the DEA as appellant Lombardi, was unable to locate the needed facility. Almost four months elapsed before the laboratory began to take shape. In the middle of September, Ryland Luttrell, caretaker and watchman at 135 Ellis Street in Staten Island, was visited by three men, one of whom Luttrell subsequently identified as appellant DiPalermo. The visitors took a look around the premises—no doubt taking note of the fact that 135 Ellis Street is in a remote area of Staten Island, that the property occupies about 13 acres of land, and that situated thereon was a rather run-down old house, as well as a dock. Luttrell observed DiPalermo get out of the car, but he was approached only by DiPalermo's two companions. These two men asked Luttrell certain questions about the condition of the dock and the depth of the water, reported back to DiPalermo, returned to ask a few more questions, again returned to the car, and drove off.

Approximately a month later, Gillette was observed by the DEA at the Ellis Street location. When he left the premises, DEA agents followed him into lower Manhattan, observed him make a series of telephone calls from a public booth and, fifteen minutes after making the calls, being joined by DiPalermo. One of the agents strolled by Gillette and DiPalermo and overheard the following conversation:

> DiPalermo: It is a lot of money.
>
> Gillette: I know it is a lot of money. That's why you've got to straighten it out.

After about fifteen minutes, DiPalermo left. A week later, Gillette was again observed at the Ellis Street site. Upon leaving, he was again followed to the same street corner in lower Manhattan where he again met with DiPalermo. Again a DEA agent walked by them, this time overhearing DiPalermo saying to Gillette: "This is what you do."

Five days later, on October 31, the chemicals were moved from the New Jersey warehouse to 135 Ellis Street, the entire day's activities being monitored by the DEA. Gillette and Marchese began the day by removing the chemicals from the New Jersey warehouse and depositing them into a Ryder rental truck. Gillette then drove the truck to Lombardi's Staten Island address, with Marchese following in Gillette's car. Gillette explained to Marchese that the truck was being left there so that "Herman" could keep an eye on it. Shortly after that, DEA agents observed Lombardi driving the truck on a route leading directly to 135 Ellis Street. At a certain point in its travels, however, the truck began to vary its speeds considerably and take what are commonly referred to as "evasive maneuvers." Eventually, the truck worked its way back to Lombardi's residence. Later that night the truck was observed at 135 Ellis Street, where the chemicals were unloaded and taken into the house. Gillette later explained to Marchese that "Herman" had successfully delivered the chemicals to the soon to be operating laboratory. Gillette also explained to Marchese that the DEA surveillance had been picked up during the attempted delivery of the chemicals, that he was troubled by this development, and that he would have to talk to his "friend in New York" about the situation. His "friend in New York"

turned out to be named "Joe Beck," which is apparently a name used on occasion by appellant DiPalermo.

Because none of the participants in the scheme had sufficient knowledge of chemistry to go about manufacturing marketable quaaludes, they next set about the task of recruiting someone who did. Appellant Kassebaum, a licensed New York pharmacist, apparently fit the bill. Both Luttrell and various DEA agents observed Kassebaum at the 135 Ellis Street site on a number of occasions. Upon leaving Ellis Street on one such occasion, he was followed by DEA agents who subsequently overheard him state over a telephone: "I finally got something good and nice for you. It turned color."[1] DEA agents subsequently observed Kassebaum purchasing paraphernalia that was eventually seized at the laboratory.

On November 14 the DEA closed in, arresting Kassebaum a short distance from the Ellis Street laboratory and escorting him back to the premises so they could execute a search warrant. Kassebaum broke free, however, ran into the house and closed the door behind him. The agents, locked out of the house, determined that Kassebaum had fled to the bathroom and had begun flushing evidence down the toilet. They forced their way in and found Kassebaum shielding himself behind his German Shepherd. The agents prevailed, however, took Kassebaum into custody, and proceeded to search the laboratory. In the first floor bathroom they discovered a brown powder which turned out to be methaqualone; during

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1 A DEA chemist testified at trial that color is an indication of the degree of purity of methaqualone.

their search of the rest of the house they seized more methaqualone, various pieces of laboratory equipment, and the chemicals that had been purchased by Marchese and Gillette from the Berg Chemical Company.

In our judgment, only two of the issues raised by the appellants warrant discussion, those issues focusing on Luttrell's in-court identification of DiPalermo and the nature and sufficiency of the evidence to support the conviction of Lombardi.

After all of the defendants had been arrested, the DEA interviewed Luttrell regarding his recollection of the happenings at 135 Ellis Street. He described an individual who fit the description of Gillette and, when shown a photograph of Gillette, identified him as one of the men to whom he had spoken about renting the Ellis Street facility. At that point, the DEA put together a spread of photographs, including photographs of DiPalermo, and asked Luttrell if he recognized any of the subjects. Luttrell picked out DiPalermo as someone who had been at the Ellis Street site, and he related the details of DiPalermo's visit. Luttrell subsequently identified DiPalermo during the trial as one of the individuals he had seen at the Ellis Street location.

This Court has recently explained the law as it relates to in-court identifications that have been preceded by pre-trial photographic identifications in the following fashion:

> A conviction "based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was

> so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." . . . "[R]eliability is the linchpin in determining the admissibility of identification testimony," . . . and the court must look to the "totality of the circumstances" to determine whether the in-court identification is reliable even if the pretrial identification procedure was suggestive.

United States v. Sanchez, slip op. 3901, 3907-08 (2d Cir. July 19, 1979), *quoting Simmons v. United States,* 390 U.S. 377, 384 (1968); *Manson v. Brathwaite,* 432 U.S. 98, 114 (1977); *and Neil v. Biggers,* 409 U.S. 188, 199 (1972). *See generally United States v. Williams,* 596 F.2d 44, 48-49 (2d Cir. 1979); *Jackson v. Fogg,* 589 F.2d 108, 111 (2d Cir. 1978); *United States v. Moskowitz,* 581 F.2d 14, 19-20 (2d Cir.), *cert. denied,* 99 S.Ct. 204 (1978). Included in the "totality of the circumstances" are "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of the certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v. Biggers, supra,* 409 U.S. at 199-200.

Although DiPalermo's counsel has pointed to certain weaknesses in the government's procedures and in Luttrell's identification, it is our judgment that, with a view toward the "totality of the circumstance," the identification passes muster. Although the photographic identification procedure is subject to criticism because there were more photographs of DiPalermo than of any of the others and because

DiPalermo's photograph had a DEA label, it is nevertheless our conclusion that this did not "give rise to a very substantial likelihood of irreparable misidentification." In addition, it is our conclusion that Luttrell's identification of DiPalermo in the courtroom was a "reliable" one. Luttrell, after all, was responsible for scrutinizing visitors to the Ellis Street location, and he had a good deal of time during which to view DiPalermo, some of which was spent at relatively close range.

As to appellant Lombardi, it is our judgment that there was sufficient non-hearsay evidence to justify the admission of statements made by his fellow conspirators and that, with this evidence properly admitted, there was sufficient evidence to support his conviction. On this issue as well, this Court has on recent occasion set out the governing law. In *United States v. Lyles,* 593 F.2d 182 (2d Cir.), *cert. denied,* 47 U.S.L.W. 3636 (U.S. Mar. 26, 1979), we said:

> When in a criminal case the government seeks, under the co-conspirator rationale, to introduce as an admission the out-of-court statement of a declarant other than the defendant, the trial judge must make a preliminary determination that there is sufficient independent evidence to establish the following: (1) that a conspiracy existed . . . ; (2) that the conspiracy was still in existence at the time the statement was made . . . ; (3) that the declarations were made in furtherance of the conspiracy . . . ; and (4) that both the declarant and the defendant participated in the conspiracy. . . . While the practicalities of proof may require that a par-

> ticular statement be admitted subject to connection, that is, subject to an adequate showing of the elements just summarized, "if at the close of the Government's case the connection has not been proved, the court must, upon motion, strike the insufficiently connected item and direct the jury to disregard it."

593 F.2d at 194 (citations and footnote omitted). And in *United States v. DeFillipo,* 590 F.2d 1228 (2d Cir. 1979), the Court reaffirmed the principle that participation by the defendant in the alleged conspiracy must be "established 'by a fair preponderance of the evidence independent of the hearsay utterances.'" 590 F.2d at 1236, *quoting United States v. Geaney,* 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied,* 397 U.S. 1028 (1970). *See also United States v. Ziegler,* 583 F.2d 77, 81 n.6 (2d Cir. 1978); *United States v. Stanchich,* 550 F.2d 1294, 1297-99 & n.4 (2d Cir. 1977); *United States v. Glazer,* 532 F.2d 224, 228-29 (2d Cir.), *cert. denied,* 429 U.S. 844 (1976); *United States v. Wiley,* 519 F.2d 1348, 1350-51 (2d Cir. 1975), *cert. denied,* 423 U.S. 1058 (1976). *Compare United States v. James,* 590 F.2d 575 (5th Cir.) (en banc), *cert. denied,* 47 U.S.L.W. 3786 (U.S. June 4, 1979).

Although we believe the case to be close in this regard, it is our conclusion that this requirement was met. Lombardi's repeated associations with the other members of the conspiracy, especially his involvement with the rental truck that carried the needed chemicals to the Ellis Street laboratory, provided strong ground for the conclusion that Lombardi was involved in an unlawful conspiracy. Although each of

the bits of evidence produced by the government to support the conclusion that Lombardi was a co-conspirator would by itself be equally consistent with innocence, such pieces of evidence are to be viewed "not in isolation but in conjunction." *United States v. Geaney, supra,* 417 F.2d at 1121. *See also United States v. Monica,* 295 F.2d 400, 401 (2d Cir. 1961), *cert. denied,* 368 U.S. 953 (1962) ("each of the . . . episodes gained color from each of the others"). As explained by Judge Friendly in *United States v. Stanchich, supra,* "[j]udges are not required to exhibit a naiveté from which ordinary citizens are free." 550 F.2d at 1300. In this light, the *Geaney* test was met, and in that light, there was sufficient evidence to support Lombardi's conviction.

The other claims put forth by the appellants must also be rejected. Our review of the record satisfies us that there was sufficient evidence to support each of the convictions. Although the comments during summation by the Assistant United States Attorney in charge of the trial do not merit our approval, neither do they warrant reversal in this case. We do caution the government, however, that "[i]n conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant," *Glasser v. United States, supra,* 315 U.S. at 76, the content and tone of the summation should be kept closely in check. There is no merit to the claim by Gillette that his conviction should be reversed because he conferred with DEA agents without the presence of his counsel. The record shows that Gillette initiated the contact and that he was in no way prejudiced by its having occurred. *See*

Weatherford v. Bursey, 429 U.S. 545 (1977). DiPalermo's sentencing hearing was conducted in accord with the governing law of this Circuit. *See United States v. Fatico*, slip op. ____ (2d Cir. , 1979); *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978). The remaining claims do not merit discussion.

The judgments of conviction are affirmed.

APPENDIX B — ORDERS DATED OCTOBER 25, 1979 DENYING PETITION

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of October, one thousand nine hundred and seventy-nine.

Present:

HON: MURRAY I. GURFEIN,

HON: THOMAS J. MESKILL,
Circuit Judges

HON: CHARLES E. WYZANSKI,
District Judge

Circuit Judges.

Filed October 25, 1979

United States of America,

Plaintiff-Appellee,

v.

JOSEPH DiPALERMO,
SALVATORE LOMBARDI,
ALAN KASSEBAUM,
GEORGE GILLETTE,

Defendants-Appellants.

Appendix B

78-1408
78-1413
79-1032
79-1046

A petition for a rehearing having been filed herein by counsel for the appellant, Joseph DiPalmero.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. Daniel Fusaro,
Clerk

UNITED STATES COURT OF APPEALS

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-five day of October, one thousand nine hundred and seventy-nine.

UNITED STATES OF AMERICA,

Plaintiff-appellee,

v.

JOSEPH DiPALERMO,
SALVATORE LOMBARDI,
ALAN KASSEBAUM,
GEORGE GILLETTE,

Defendants-Appellants.

Filed October 25, 1979

78-1408
78-1413

Appendix B

79-1032
79-1046

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant Joseph DiPalermo and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

s/ Irving R. Kaufman
Chief Judge